Supreme Court, U.S.
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No. 02-1697

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002

STEPHEN LARI SCHLUTER,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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21 pp

QUESTION PRESENTED

Does the passage of a law which effectively creates a new crime based upon a prior qualifying offense violate the Ex Post Facto law clause contained in Art. I, § 10 of the United States Constitution when that predicate offense was not so defined at the time that it was committed?

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Respondent, State of Minnesota, respectfully prays that the Petition for a Writ of Certiorari be denied by this Court. The Minnesota Court of Appeals opinion is reported as State v. Schluter, 653 N.W.2d 787 (Minn. App. 2002) and is attached to the Petition as Appendix A, P.P. A2-A18.

STATEMENT OF THE CASE

Petitioner, Stephen Lari Schluter, was convicted on October 2, 1986 of Possession of LSD With Intent To Distribute in violation of Minn. Stat. §§ 152.09, Subd. 1(1), 152.02, Subd. 2, and 152.15, Subd. 1(2) (1984). He was discharged from a probationary sentence on October 1, 1991.

In 1987, the Minnesota legislature extended the definition of "crime of violence" contained in Minn. Stat. § 624.712, Subd. 5 to include felony violations of Chapter 152. See Laws of Minnesota 1987, Ch. 276, § 3. In 1994, the legislature made it a crime, effective August 1, 1994, for those individuals to possess any firearm by amending Minn. Stat. § 624.713, Subd. 1(b). See Laws of Minnesota 1994, Ch. 636, Art. 3, §§ 27 and 47.

On September 10, 2000, St. Paul Police received a citizen complaint that Petitioner had fired shots at her truck. When they went to Petitioner's house to investigate, they found two firearms hidden under a couch after he gave them consent to search. The facts underlying the discovery of the firearms, while not relevant to this Petition, are set forth in detail in the State Court opinion. See State v. Schluter, 653 N.W.2d at 788-789.

Petitioner was subsequently convicted of possessing those firearms in violation of Minn. Stat. § 624.713, Subd. 1(b) with his ineligibility created by the 1986 felony drug conviction. The Minnesota Court of Appeals affirmed his conviction, holding that there was no ex post facto violation of either the United States or Minnesota Constitutions when a criminal statute prohibiting the possession of firearms was based upon a

predicate felony committed before the statute's effective date. See State v. Schluter, 653, N.W.2d at 790-792. The Minnesota Supreme Court, pursuant to Minn. R. Crim. Proc. 29.04, declined discretionary review of this case.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The case at bar does not present any compelling reasons why certiorari should be granted. While a United States Constitutional issue has been presented, it is neither unsettled in nature nor does it merit further consideration.

The Minnesota courts have not misapplied any controlling principles of constitutional law nor was the case decided in a manner that conflicts with relevant decisions of this Court. Likewise, there is no conflict with other decisions that would necessitate review by this Court when other jurisdictions, both state and federal, that have decided this issue are virtually unanimous in reaching a result adverse to Petitioner.

1. Misapplication of Constitutional Principles

What constitutes an ex post facto law, as stated by this Court, has remained virtually unchanged for over 200 years. In Calder v. Bull, 3 Dall. 386 (1798), this Court provided four examples of what the ex post facto clause was designed to prevent:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." (emphasis omitted)

Id., 3 Dall. At 390.

Subsequent decisions have announced similar criteria. An ex post facto law must apply to events occurring before its enactment and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981). More specifically, to constitute an ex post facto law, a statute must: (1) punish as a crime an act which was innocent when committed; (2) increase the burden of punishment for a crime after its commission; or (3) deprive one charged with a crime of a defense that was available when it was committed. Collins v. Youngblood, 497 U.S. 37, 52 (1990). The mark of an ex post facto law is what can fairly be designated as punishment for past acts. DeVeau v. Braisted, 363 U.S. 144, 160 (1960). If, however, any restriction upon an individual occurs as a relevant incident to a regulation of a present situation, the law is not ex post facto. Id.

Applying these principles, it is readily apparent why the challenged law does not run afoul of the ex post facto clause. Using the Weaver test, the law, while based upon events occurring before its enactment, does not apply to events before its enactment. Rather, the cumulative effect of the 1987 and 1994 amendments is to simply create a new crime, i.e. possession of any firearm by a person convicted of a crime of violence, that was effective August 1, 1994. See Laws of Minnesota, Ch. 636, Art. 3, §§ 27 and 47. Petitioner's prior conviction merely places him into a status that makes this new law applicable to his future conduct, i.e. any possession of a firearm after August 1, 1994.

Likewise, the law, by itself, does not seriously disadvantage Petitioner. A defendant becomes seriously disadvantaged by this status change only if he/she engages in future unlawful conduct. Without that, the

law has no effect upon his prior conviction. Thus, there is simply no ex post facto violation under the Weaver general test.

It becomes even clearer that the law does not run afoul of the ex post facto law clause using the more specific test from Collins. The statutes of which Petitioner complains (Minn. Stat. § 624.713, Subd. 1(b) and Minn. Stat. § 624.712, Subd. 5) neither criminalizes nor punishes conduct committed before their enactment. While tied to Petitioner's status, punishment is not imposed for the prior crime, i.e. past acts, but rather for his current conduct of possessing a firearm. Any restrictions falling upon Petitioner clearly occurs as a relevant incident to regulation of a present situation "so that the ex post facto prohibitions are not brought into play". DeVeau v. Braisted, 363 U.S. at 160.

Petitioner argues that the Minnesota decision is in conflict with three recent ex post facto decisions of this court, citing Miller v. Florida, 482 U.S. 423 (1987), Lynce v. Mathis, 519 U.S. 433 (1997), and Johnson v. United States, 529 U.S. 694 (2000). See Petition, P.P. 11-19. However, in each of those cases, the challenged legislative enactment, by itself, had an affect upon the punishment imposed for the defendant's prior conviction. That is simply not present in the case at bar, for future conduct after the effective date of the legislation is necessitated before there is any affect upon Petitioner.

Petitioner also agrees that legislation which, in essence, creates a new crime prospectively applied does not violate the ex post facto law clause. See Petition, P.P. 20-21. Contrary to his claim, this is precisely Petitioner's situation. He was given a status in 1987 that

prohibited him from possessing certain types of firearms. That prohibition was extended, effective August 1, 1994, to any firearm. He possessed a firearm on September 10, 2000. An ex post facto situation is not created when Petitioner is convicted and punished for an act that occurred after the statute had been amended.

2. Conflicting Decisions Do Not Necessitate Review

Petitioner also argues that review is necessitated by State v. Trower, 629 N.W.2d 594 (S.D. 2001), a conflicting decision from the neighboring state of South Dakota. See Petition, P.P. 8-11. However, what he neglects to tell this Court is that the other jurisdictions that have passed on this issue (14 states and 6 federal circuits) have ALL decided adversely to his position.

While this was an issue of first impression in Minnesota, numerous other jurisdictions had passed upon it. The overwhelming majority of them (14 out of 15 states and 6 federal circuits) hold that a conviction for possession of a firearm by a felon does not violate the ex post facto clause when the predicate offense took place before the statute was enacted or amended. The cases are collected in Respondent's Appendix, P.P. A1-A2

Thus, Trower, the case upon which Petitioner relies, literally stands alone and is not of such magnitude that review is not necessitated.

Moreover, this Court has denied certiorari in at least six of those cases dating back to 1943. See Respondent's Appendix, P.P. A1-A2. They include United States v. Mitchell and State v. Peters, two decisions heavily relied upon by the Minnesota Court. See State v. Schluter, 653 N.W.2d at 791-792. Petitioner has presented no reasons, let alone compelling ones, why this case should not meet the same fate.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Dated: June 16, 2003

Respectfully submitted,

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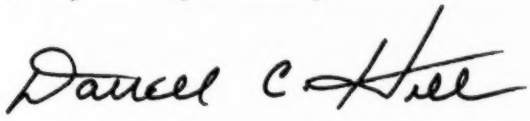

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RESPONDENT'S APPENDIX

A conviction for Possession of a Firearm by an Ineligible Person does not violate the constitutional protections against ex post facto laws, even though the predicate offense/conduct occurred before the statute was enacted or amended.

States

People v. Olvera, 191 Ariz. 75, 952 P.2d 313 (1997)
Finley v. State, 282 Ark. 146, 666 S.W.2d 701 (1984)
People v. Mills, 6 Cal App. 4th 1278, 8 Cal Rptr. 2d 310 (1992)
Landers v. State, 250 Ga. 501, 299 S.E.2d 707 (1983)
State v. Swartz, 601 N.W.2d 348 (Ia. 1999), cert. denied 528 U.S. 1167 (2000)
State v. Williams, 358 So. 2d 943 (La. 1978)
State v. Vainio, 466 A.2d 471 (Me. 1983) cert. denied 476 U.S. 1204 (1984)
People v. Tice, 220 Mich. App. 47, 558 N.W.2d 245 (1996)
State v. Peters, 261 Neb. 416, 622 N.W.2d 918 (2001), cert. denied 533 U.S. 952 (2001)
Hand v. State, 107 Nev. 577, 816 P.2d 468 (1991)
State v. Lamb, 110 Or. App. 146, 822 P.2d 143 (1991)
Jordan v. State, 56 S.W.3d 326 (Tex. Ct. App. 2001), pet. for review denied (Tex. May 15, 2002)
Dodson v. Commonwealth, 23 Va. App. 286, 476 S.E.2d 512 (1996)

State v. Schmidt and Ayers, 143 Wash. 2d 658, 23 P.3d 426 (2001)

CONTRA: State v. Trower, 629 N.W.2d 594 (S.D. 2001)

Federal Circuits

Cases v. United States, 131 F.2d 916 (1st Cir. 1942), cert. denied 319 U.S. 770 (1943)
United States v. Brady, 26 F.3d 282 (2nd Cir. 1994), cert. denied 513 U.S. 894 (1994)
United States v. Mitchell, 209 F.3d 319 (4th Cir. 2000), cert. denied 531 U.S. 849 (2000)
United States v. Sutton, 521 F.2d 1385 (7th Cir. 1975)
United States v. Huss, 7 F.3d 1444 (9th Cir. 1993), overruled diff issue by United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998)
Smith v. United States, 312 F.2d 119 (10th Cir. 1963)